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UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

IN THE MATTER OF THE EXTRADITION OF KENNETH WAYNE FROUDE, A Fugitive from the Government of Canada.	No. CV 15-8623-JLS-E GOVERNMENT'S MEMORANDUM IN SUPPORT OF EXTRADITION Hearing Date: April 11, 2016 Hearing Time: 9:30 a.m. Location: Courtroom of the Hon. Charles F. Eick

On behalf of the government of Canada, complainant United States of America, by and through its counsel of record, the United States Attorney for the Central District of California and Assistant United

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States Attorney Nathaniel B. Walker, hereby submits its memorandum in support of extradition in the above-captioned matter.

Dated: March 14, 2016

Respectfully submitted,

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/s/
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On October 1, 2015, fugitive KENNETH WAYNE FROUDE ("FROUDE" or the "fugitive") was arrested in this district on a complaint for an arrest warrant and extradition under 18 U.S.C. § 3184 ("Section 3184") signed on September 23, 2015, by United States Magistrate Judge Jacqueline Chooljian. The complaint and arrest warrant were sought by the United States at the request of the Government of Canada pursuant to the Extradition Treaty Between the United States of America and Canada ("the Treaty").[1] See 27 U.S.T. 983, TIAS 8237. At FROUDE's initial appearance on October 1, 2015, United States Magistrate Judge Michael R. Wilner ordered FROUDE detained pending a hearing under Section 3184 and the Treaty. In this matter, the United States acts on behalf of the Canadian government in accordance with United States' treaty obligations.

Canada has submitted a formal request for FROUDE's extradition and surrender, supported by appropriate documents, to the United States Department of State. As required by statute, this Court has scheduled a hearing for April 11, 2016, at 9:30 a.m., to consider the evidence of criminality presented by Canada and to determine whether such evidence is "sufficient to sustain the charge under the provisions of the proper treaty or convention." 18 U.S.C. § 3184. If the Court finds the evidence sufficient, it must "certify the

[1] A copy of the Treaty was filed, along with the formal extradition paperwork, concurrently with the complaint. See 15-MJ-1770-DUTY, Dkt. No. 1, later consolidated into 15-CV-08623-JLS-E.

same" to the Secretary of State, who will then decide whether to surrender the fugitive "according to the treaty."[2] Id.

Because an extradition hearing is neither a criminal nor a civil proceeding, but is sui generis, the government offers this memorandum both setting out the legal principles that guide the hearing to be held pursuant to Section 3184, and analyzing how the facts presented establish that this Court should certify FROUDE's extradition to the Secretary of State.

II. STATEMENT OF FACTS

Canada seeks FROUDE's extradition on two separate bases: 1) to serve the remainder of his sentence, namely, 3,409 days pursuant to a Long Term Supervision Order ("LTSO") imposed on May 16, 2008;[3] and 2) to stand trial for three charges of failing to comply with the LTSO.[4] Canada seeks FROUDE's extradition based upon the following facts which are supported by the declarations of Lisa Manson, National Manager, Sentence Management for the CSC, and Karen Shai,

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[2] After the Court has completed its "limited inquiry, the Secretary of State conducts an independent review of the case to determine whether to issue a warrant of surrender." Martin v. Warden, Atlanta Penitentiary, 993 F.2d 824, 829 (11th Cir. 1993).

[3] A Warrant of Apprehension, Suspension and Recommitment to custody of Long Term Supervision was issued for FROUDE on May 18, 2013, following his escape from the custody of the Correctional Service of Canada ("CSC").

[4] On April 29, 2015, an information filed in the Ontario, Canada, Court of Justice, charged FROUDE with failing to: 1) reside at a community correctional center or facility approved by the CSC; 2) remain in Canada or within the territorial boundaries fixed by his Parole Supervisor; and 3) "obey the law and keep the peace" as ordered in the LTSO. Each charge is an alleged violation of Section 753.3(1) of the Canadian Criminal Code.

Barrister and Solicitor, Counsel in the Crown Law Office – Criminal, Ministry of the Attorney General for the Province of Ontario.[5]

A. FROUDE Has Failed to Serve the Entirety of His Sentence

On March 9, 2006, in the Superior Court of Justice in London, Ontario, Canada, FROUDE was convicted by a Superior Court Justice, sitting with a jury, of one count of breaking and entering with the intent to commit a sexual assault (in violation of Section 341(b) of the Canadian Criminal Code), one count of sexual assault with a weapon (in violation of Section 272(2) of the Canadian Criminal Code), and one count of uttering threats to cause bodily harm (in violation of Section 264.1(2) of the Canadian Criminal Code) in relation to conduct FROUDE committed in 2004. On May 5, 2008, Justice Rady of the Superior Court of Justice declared FROUDE a "Long-Term Offender." A Canadian judge will designate an individual to be a Long-Term Offender if the judge is satisfied that: 1) it would be appropriate to impose a sentence of imprisonment of two years or more for the offense(s) for which the offender has been convicted; 2) there is a substantial risk that the offender will reoffend; and 3) there is a reasonable possibility of eventual control of the risk in the community.

On May 16, 2008, Justice Rady sentenced FROUDE to ten years' imprisonment for the three offenses of conviction,[6] and also imposed a ten-year LTSO. FROUDE was released from prison on November 12, 2010, and became subject to the LTSO upon his release. FROUDE was

[5] The declarations of Mses. Manson and Shai were previously filed with this Court on September 23, 2015, and again on November 4, 2015.

[6] Judge Rady calculated the prison term by sentencing FROUDE to 30 months' imprisonment, plus 1,344 days spent in pre-trial custody, credited at a ratio of two-to-one.

supposed to begin serving his ten-year supervisory sentence that day. However, on November 10, 2010, FROUDE failed to report to the community correctional center at which the CSC had ordered him to live. Instead, FROUDE hired a taxi and went into downtown Kingston, Ontario, Canada. FROUDE was eventually captured, and On March 25, 2011, FROUDE was convicted of two counts of Failing or Refusing to Comply with the LTSO and one count of Engaging In Threatening Conduct, and was sentenced to 19 months' imprisonment. FROUDE was released from prison on April 12, 2012. On April 13, 2012, FROUDE's whereabouts again became unknown and a Warrant of Apprehension, Suspension and Recommitment to Custody was issued. FROUDE was eventually located in the United States and, on July 19, 2012, the United States returned FROUDE to Canada where he served additional time in prison. On January 28, 2013, FROUDE resumed his service of the LTSO at the Portsmouth Community Correctional Center, in Kingston, Ontario, Canada.

On the morning of May 18, 2013, FROUDE absconded from the community correctional center where he was serving the remainder of his sentence, and a Warrant of Apprehension, Suspension and Recommitment to custody of Long Term Supervision was issued. The warrant stated that FROUDE was an unmanageable risk to the community and suspended his release. CSC now accuses FROUDE of not serving the entirety of the ten-year LTSO and seeks to enforce the remainder of the supervision order. The LTSO does not expire until September 22, 2022. FROUDE has 3,409 days remaining to serve on the LTSO.

B. FROUDE Has Failed to Comply With the Terms of the LTSO

The LTSO requires FROUDE to abide by certain conditions, for example, to reside at a "Community Correctional Centre or a

Community-Based Residential Facility approved by CSC," to remain at all times in Canada within the territorial boundaries fixed by his Parole Supervisor; and to obey the law and keep the peace.

On Friday, May 17, 2013, Commissionaire Dan Laurie ("Laurie") was on duty at the Portsmouth Community Correctional Center where FROUDE was living pursuant to the LTSO. At approximately 11:30 p.m., Laurie was checking the facility to make sure it was secure, and to account for the presence of all residents. Laurie saw FROUDE between 11:30 p.m. and 11:45 p.m. in the kitchen of FROUDE's unit. At 12:00 a.m. all exterior doors of the center were locked and alarmed, and remained so until 6:00 a.m. Saturday, May 18, 2013.

Between 12:00 a.m. and 6:00 a.m. on Saturday, May 18, 2013, Laurie and Commissionaire Rodger Corcoran ("Corcoran") conducted four "bed checks" to ensure each resident was accounted for in his room. It appeared to Laurie and Corcoran that FROUDE was asleep in his bed in Unit 8, Room C. However, on May 18, 2013, at approximately 11:30 a.m., Parole Officer Sandi Desjardins received an anonymous text message from a resident stating that FROUDE had left the center the previous night. Upon receipt of this information, Commissionaire Robert Arter ("Arter") looked for FROUDE in FROUDE's room. Arter looked through the small window in the door and knocked. There was no response. Arter unlocked the door, and walked over to the bed. Arter saw that a comforter and a shirt had been used to make it appear that FROUDE was asleep in the bed. Most of FROUDE's belongings were gone, including his television and stereo. Arter checked the rest of the unit, but could not find FROUDE. Arter then checked the entire facility and surrounding property, but FROUDE could not be located. On or about October 1, 2015, United States

Marshals arrested FROUDE in the United States, in Glendale, California, within the Central District of California.

III. PROCEDURAL OVERVIEW

A. An Extradition Hearing Follows Procedures Distinct From Criminal Proceedings

The extradition hearing prescribed by Section 3184 is unique. See, e.g., Martin, 993 F.2d at 828; Jhirad v. Ferrandina, 536 F.2d 478, 482 (2d Cir. 1976) (extradition is sui generis), cert. denied, 429 U.S. 833 (1976). As described in Jhirad, an extradition hearing has a structure and process defined by statute and treaty. Id. Thus, it is expressly not a criminal proceeding; its purpose is to decide the sufficiency of the charge under the treaty, not guilt or lack thereof. Neely v. Henkel, 180 U.S. 109, 123 (1901). The limited nature of the hearing has resulted in special procedural and evidentiary rules. For example, the person whose extradition is sought is not entitled to the rights available in a criminal trial. Neely, 180 U.S. at 122 (rights available to one charged with criminal offense in this country not applicable to offenses committed outside the United States against the laws of another country); accord Charlton v. Kelly, 229 U.S. 447, 461 (1913); Martin, 993 F.2d at 829. The purpose of an extradition hearing under Section 3184 is not to try the underlying charge; that is for the foreign court. Neely, 180 U.S. at 123.

The Federal Rules of Criminal Procedure do not apply to extradition proceedings. See Fed. R. Crim. Pro. 1(a)(5) ("These rules are not applicable to extradition and rendition of fugitives."). The Federal Rules of Evidence are also inapplicable. See Fed. R. Evid. 1101(d)(3) ("The rules (other than with respect to

privileges) do not apply . . . [to p]roceedings for extradition or rendition."); see also Melia v. United States, 667 F.2d 300 (2d Cir. 1981); Greci v. Birknes, 527 F.2d 956 (1st Cir. 1976).

Moreover, a fugitive has no right to discovery. Messina v. United States, 728 F.2d 77, 80 (2d Cir. 1984). "Discovery in an international extradition hearing is limited and lies within the discretion of the magistrate." In re Extradition of Kraiselburd, 786 F.2d 1395 1399 (9th Cir. 1986); cf. Oen Yin-Choy, 858 F.2d at 1407 ("Although there is no explicit statutory basis for ordering discovery in extradition proceedings, the extradition court has the inherent power to order such discovery procedure as law and justice require.").

Further, a fugitive's constitutional rights are limited. The fugitive has no right to cross-examine witnesses who might testify at the hearing. Oen Yin-Choy, 858 F.2d at 1407. There is no Sixth Amendment right to a speedy trial. Yapp v. Reno, 26 F.3d 1562, 1565 (11th Cir. 1994); Martin, 993 F.2d at 829; Sabatier v. Dabrowski, 586 F.2d 866, 869 (1st Cir. 1978). The Fifth Amendment guarantee against double jeopardy does not apply to successive extradition proceedings. Collins v. Loisel, 262 U.S. 426, 429 (1923); Matter of Extradition of McMullen, 989 F.2d 603, 612-613 (2d Cir. 1993). Absent egregious government misconduct, the Fourth Amendment and the exclusionary rule are not applicable. Magisano v. Locke, 545 F.2d 1228, 1230 (9th Cir. 1976) (argument as to alleged illegalities in wiretapping were not revlevant). Finally, the fugitive does not have the right to confront his accusers. Bingham v. Bradley, 241 U.S. 511, 517 (1916).

B. Extradition Hearings Rely on Written Submissions and Do Not Require Live Witnesses

A certification of extradition may be based entirely on the authenticated documentary evidence and information provided by the requesting government. See, e.g., Bovio v. United States, 989 F.2d 255, 259-261 (7th Cir. 1993) (Swedish investigator's statement sufficient to establish probable cause); O'Brien v. Rozman, 554 F.2d 780, 783 (6th Cir. 1977); Shapiro, 478 F.2d at 902-903; In re Extradition of Mainero, 990 F. Supp. 1208, 1212-1213 (S.D. Cal. 1997) (statements of co-conspirators and other witnesses sufficient in extradition to Mexico for murder). A certification may also be based upon written statements by the foreign prosecutor or judge summarizing the evidence. See Rice v. Ames, 180 U.S. 371, 375-376 (1901); accord Glucksman v. Henkel, 221 U.S. 508, 513-514 (1911).

Section 3184 and the applicable treaty govern both the nature of and the admissibility of the evidence at an extradition hearing. In this case, Articles 9 and 10 of the Treaty list the documentary submissions required from the Government of Canada. Specifically, 18 U.S.C. Section 3190 provides that "properly and legally authenticated" documentary evidence including "depositions, warrants, or other papers or copies thereof shall be admitted." See Barapind v. Enomoto, 360 F.3d 1061, 1069 (9th Cir. 2004); see also Collins, 259 U.S. at 313. Proof that the authentication is proper and legal exists if the documents are accompanied by the certification of an appropriate United States diplomatic or consular officer in the requesting country attesting that the documents would be admissible for similar purposes in that country. See 18 U.S.C. § 3190. (The documents filed in this case are accompanied by the appropriate

certification from Bruce A. Heyman, of the United States Embassy in Ottawa, Canada.)

Extradition treaties do not require or even anticipate the testimony of live witnesses at the hearing because to do so "would defeat the whole object of the treaty." Yordi v. Nolte, 215 U.S. 227, 231 (1909); see also Bingham, 241 U.S. at 517; Afanasjev v. Hurlburt, 418 F.3d 1159, 1163-1165 (11th Cir. 2005), cert. denied, 546 U.S. 993 (2005); Artukovic v. Rison, 784 F.2d 1354, 1356 (9th Cir. 1986); Shapiro, 478 F.2d at 902. Hearsay evidence is admissible at extradition hearings, and may fully support a court's findings leading to a certification under Section 3184. Collins, 259 U.S. at 317; Enami v. U.S. Dist. Ct. for N. Dist. Cal., 834 F.2d 1444, 1450-53 (9th Cir 1987).

In Bingham, the Supreme Court rejected the respondent's claim that ex parte witness affidavits submitted in support of his extradition to Canada should not be considered because he had not had the opportunity to cross-examine those witnesses. The Court referred to the applicable treaty language, which obligated the United States to extradite "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed." Bingham, 241 U.S. at 517. As Section 3190 does today, its predecessor, applicable in Bingham, provided for the admissibility at the extradition hearing of depositions, warrants and similar documents upon proper certification by the U.S. diplomatic or consular officer. This principle of extradition law is even more firmly-rooted today than it was in 1916 when the Supreme Court decided Bingham. See Zanazanian v. United

States, 729 F.2d 624, 626-627 (9th Cir. 1984) (applying Bingham in extradition to Sweden); Shapiro, 478 F.2d at 902 (obviating necessity of confronting accused with witnesses against him is "one of the prime objects of bi-lateral extradition agreements. Even the advent of modern transportation and communication has not changed this firmly-rooted posture of the U.S. courts.").

C. A Fugitive's Ability to Challenge Evidence is Limited

Due to the nature and limited purpose of an extradition hearing under Section 3184, and the importance of the international obligations of the United States under an extradition treaty, a fugitive's opportunity to challenge the evidence introduced against him is exceedingly circumscribed. A fugitive may not introduce evidence that contradicts the evidence submitted on behalf of the requesting country, but may introduce evidence explaining the submitted evidence. "Generally, evidence that explains away or completely obliterates probable cause is the only evidence admissible at an extradition hearing, whereas evidence that merely controverts the existence of probable cause, or raises a defense, is not admissible." Barapind, 400 F.3d at 749 (quoting Mainero v. Gregg, 164 F.3d 1199, 1207, n.7 (9th Cir. 1999)). As the Supreme Court has explained:

> If this were recognized as the legal right of the accused in extradition proceedings, it would give him the option of insisting upon a full hearing and trial of his case here; and that might compel the demanding government to produce all its evidence here, both direct and rebutting, in order to meet the defense thus gathered from every quarter. The result would be that the foreign government though entitled by the terms of the treaty to the extradition of the accused for the purpose of a trial where the crime was committed, would be compelled to go into a full trial on the merits in a foreign country, under all the disadvantages of such a situation, and could not obtain extradition until after it had procured a conviction of the

> accused upon a full and substantial trial here. This would be in plain contravention of the intent and meaning of the extradition treaties.

Collins v. Loisel, 259 U.S. 309, 316 (1922); accord Charleton, 229 U.S. at 461.

The extent to which the fugitive may offer explanatory proof is largely within the discretion of the committing judicial officer. Hooker v. Klein, 573 F.2d 1360, 1369 (9th Cir. 1978). The category of what constitutes explanatory evidence, however, is small in light of the limited purpose of the hearing, i.e., to determine the sufficiency of the evidence to sustain the charge, and the overarching goal of the proceeding, which is to effectuate the purposes of the treaty. An extradition hearing necessarily excludes evidence that requires the court to make determinations outside of the scope of the hearing or within the province of the ultimate trier of fact, particularly when those determinations rest on foreign law. Such evidence exceeds the limits of "explanatory" or "obliterating" evidence and is not properly before the court. See In re Solis, 402 F. Supp. 2d 1128, 1132 (C.D. Cal. 2005).

> The distinction between "contradictory evidence" and "explanatory evidence" is difficult to articulate. However, the purpose behind the rule is reasonably clear. In admitting "explanatory evidence," the intention is to afford an accused person the opportunity to present reasonably clear-cut proof which would be of limited scope and having some reasonable chance of negating a showing of probable cause. The scope of this evidence is restricted to what is appropriate to an extradition hearing. The decisions are emphatic that the extraditee cannot be allowed to turn the extradition hearing into a full trial on the merits.

Matter of Sindona, 450 F. Supp. 672, 685 (S.D.N.Y. 1978), aff'd sub nom., Sindona v. Grant, 619 F.2d 167 (2d Cir. 1980).

D. An Extradition Hearing Excludes Technical and Affirmative Defenses

A court should reject defenses against extradition that "savor of technicality," as they are peculiarly inappropriate in dealings with a foreign nation. See Glucksman, 221 U.S. at 513-514; accord Bingham, 241 U.S. at 517; United States ex rel. Bloomfield v. Gengler, 507 F.2d 925, 927-1024 (2d Cir. 1974); Shapiro, 478 F.2d at 904. For example, a variance between the charges pending in the foreign state and the complaint filed on behalf of that state in our federal courts is not a defense to surrender. See id.

It is also well settled that affirmative defenses to the merits of the charge are not to be entertained in extradition hearings. See Charlton, 229 U.S. at 462; Hooker, 573 F.2d at 1368. A fugitive may not introduce evidence that merely conflicts with the evidence submitted on behalf of the demanding state, attempts to establish an alibi, suggests an insanity defense, or seeks to impeach the credibility of the demanding country's witnesses. See Collins, 259 U.S. at 315-317 (conflicting evidence not admitted); Charlton, 229 U.S. at 462 (insanity defense not permitted); Shapiro, 478 F.2d at 901 (alibi defense not permitted); Hooker, 573 F.2d at 1368 (stating that "the extraditing court properly may exclude evidence of alibi, of facts contradicting the government's proof, or of a defense such as insanity"); Bovio, 989 F.2d at 259 (attack on witness credibility not allowed). Such issues, which require factual and credibility determinations, are for the court in the requesting country to resolve at a trial of the charges. See id.

E. Considering Matters Other Than Sufficiency of the Evidence is the Exclusive Province of the Executive Branch

Other than the sufficiency of the evidence, all matters that may be raised by the fugitive as defenses to extradition are to be considered by the Secretary of State, not by the court. See 18 U.S.C. §§ 3184, 3186. In making extradition determinations, "[t]he Secretary exercises broad discretion and may properly consider factors affecting both the individual defendant as well as foreign relations - factors that may be beyond the scope of the magistrate judge's review." Sidali v. I.N.S., 107 F.3d 191, 195 n.7 (3d Cir. 1997), cert. denied, 522 U.S. 1089 (1998). The Secretary of State takes into account, for example, humanitarian claims and applicable statutes, treaties, or policies regarding appropriate treatment in the receiving country. See Ntakirutimana v. Reno, 184 F.3d 419, 430 (5th Cir. 1999). This segregation of duties is consistent with the long-held understanding that surrender of a fugitive to a foreign government is "purely a national act . . . performed through the Secretary of State," within the Executive's "powers to conduct foreign affairs." See In re Kaine, 55 U.S. 103, 110 (1852).

Therefore, under this constitutionally-based rule of judicial non-inquiry, a fugitive's contention that the extradition request is politically motivated or that the justice system of the requesting state is unfair should be addressed by the Secretary of State. It is not the role of the court to look behind the extradition request to the motives of the requesting country. Ordinola v. Hackman, 478 F.3d 588, 604 (4th Cir. 2007), cert. denied, 128 S.Ct. 373 (2007) ("the motives of the requesting government are irrelevant to our decision" and "must be addressed to the Secretary of State"); Eain v. Wilkes,

641 F.2d 504, 513 (7th Cir. 1981) (sole discretion of Secretary of State to determine whether foreign country's request for extradition is a subterfuge), cert. denied, 454 U.S. 894 (1981). Likewise, the court should not investigate the fairness of the requesting country's criminal justice system. United States v. Lui Kin-Hong, 110 F.3d 103, 110 (1st Cir. 1997); see also Blaxland v. Commonwealth Director, 323 F.3d 1198, 1208 (9th Cir. 2003).

Similarly, the Secretary of State has sole discretion under Section 3186 and the relevant treaty to determine whether a request for extradition should be denied on humanitarian grounds because of procedures or treatment awaiting the surrendered fugitive. See Quinn v. Robinson, 783 F.2d 776, 790-791 (9th Cir. 1986); Ahmad v. Wigen, 910 F.2d 1063, 1066 (2d Cir. 1990) ("[T]he degree of risk to [the accused's] life from extradition is an issue that properly falls within the exclusive purview of the executive branch." (quoting Sindona, 619 F.2d at 174)).

Further, a fugitive's contention that he will be tried in the extraditing country for crimes other than those for which extradition will be granted must be rejected as beyond the responsibility of the court, for the United States government does not presume that the demanding government will seek a trial in violation of a treaty. Bingham, 241 U.S. at 514.

IV. ARGUMENT AND ANALYSIS

A. The Role of the Judge Presiding Over Extradition Proceedings is Well-Defined

As noted above, extradition is primarily an executive responsibility with a specially defined role for a judicial officer, who is authorized by statute to determine whether to certify to the

Secretary of State that the submitted evidence is "sufficient to sustain the charge." 18 U.S.C. § 3184. The Secretary of State then makes the final decision whether a fugitive should be surrendered to the requesting country. See 18 U.S.C. §§ 3184, 3186; Martin v. Warden, Atlanta Penitentiary, 993 F.2d 824, 828 (11th Cir. 1993); Lo Duca v. United States, 93 F.3d 1100, 1110 n.10 (2d Cir. 1996).

At the extradition hearing, a court should consider the evidence presented on behalf of the requesting country and determine whether the legal requirements for certification, as defined in the treaty, statutes and case law, have been established. If any explanatory evidence is offered by the fugitive, the court should rule on its admissibility. Once the evidentiary record is complete, the court should then make written findings of fact and conclusions of law as to each of the elements for certification, including separate findings for each offense as to which extradition is sought. Shapiro v. Ferrandina, 478 F.2d 894 (2d Cir. 1973). If the court certifies the evidence to the Secretary of State, the court must commit the fugitive to the custody of the United States Marshal to await further determination by the Secretary of State regarding surrender to representatives of the requesting state. The court provides its certification to the Secretary of State together with a copy of the evidence and a transcript of any testimony presented at the hearing. 18 U.S.C. § 3184; see Barapind v. Reno, 225 F.3d 1100, 1105 (9th Cir. 2000).

In fulfilling its function under Section 3184, the judicial officer should liberally construe the applicable extradition treaty in order to effect its purpose, namely, the surrender of fugitives to the requesting country. Factor v. Laubenheimer, 290 U.S. 276, 301

(1933); United States ex rel Sakaguchi v. Kaulukukui, 520 F.2d 726, 731 (9th Cir. 1975). In applying this rule:

> [A] narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intentions of the parties to secure equality and reciprocity between them.

McElvy v. Civiletti, 523 F. Supp. 42, 47 (S.D. Fla. 1981) (quoting Factor, 290 U.S. at 287) (citations omitted). Indeed, in order to carry out a treaty obligation, the treaty "should be construed more liberally than a criminal statute or the technical requirements of criminal procedure." Factor, 290 U.S. at 298. Further, treaty countries do not expect foreign governments to be versed in one another's criminal laws and procedures. Grin v. Shine, 187 U.S. 181, 184 (1902). Thus, in extradition proceedings, "[f]orm is not to be insisted upon beyond the requirements of safety and justice." Fernandez v. Phillips, 268 U.S. 311, 312 (1925). Statements by the United States Department of State as to interpretation of treaties should be given great weight by the court. El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155, 168 (1999); Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184-185 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.").

B. The Legal Requirements for Certification are Well-Settled

An extradition certification is in order when: 1) the judicial officer is authorized to conduct the extradition proceeding; 2) the court has jurisdiction over the fugitive; 3) the applicable treaty is

in full force and effect; 4) the crime(s) for which surrender is requested are covered by the applicable treaty; and 5) there is sufficient evidence to support a finding of probable cause as to each charge for which extradition is sought. Fernandez, 268 U.S. at 312; Prassoprat v. Benov, 421 F.3d 1009, 1013 (9th Cir. 2005) (discussing scope of hearing, which is to determine whether crime is both extraditable and supported by probable cause). Here, none of the five requirements for certification of extradition can seriously be contested.

1. This Court Has Authority Over These Proceedings

The extradition statute authorizes proceedings to be conducted by "any justice or judge of the United States, or any magistrate judge authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State." See 18 U.S.C. § 3184. Consequently, either a magistrate judge or a district judge may render a certification under Section 3184. See Austin v. Healey, 5 F.3d 598, 601-602 (2d Cir. 1993) (magistrate judge had authorization to conduct the extradition hearing without specific delegation of authority).

2. This Court Has Jurisdiction Over the Fugitive

FROUDE was arrested in Gardena, California, within the Central District of California, and a court has jurisdiction over a fugitive found within its jurisdictional boundaries. See 18 U.S.C. § 3184 (court "may, upon complaint made under oath, charging any person found within his jurisdiction, . . . issue [its] warrant for the apprehension of the person so charged"). See also Pettit v. Walshe, 194 U.S. 205, 219 (1904); Grin, 187 U.S. at 181.

3. The Extradition Treaty Between the United States and Canada is in Full Force and Effect

The United States has provided a declaration from Anna Cavnar, an attorney in the Office of the Legal Adviser for the Department of State, attesting that there is a treaty in full force and effect between the United States and Canada. The Department of State's determination is entitled to deference from this Court. Then v. Melendez, 92 F.3d 851, 854 (9th Cir. 1996) (since continuing validity of treaty presents a political question, the judiciary must defer to the intentions of the Executive); see also In re Extradition of Tuttle, 966 F.2d 1316, 1317 (9th Cir. 1992). The extradition statute, Section 3184, provides for extradition in instances in which a treaty or convention is in force between the requesting state and the United States. See, e.g., In re Chan Kam-Shu, 477 F.2d 333 (5th Cir. 1973).

4. FROUDE's Crimes are Covered by the Treaty

Extradition treaties create an obligation for the United States to surrender fugitives under the circumstances defined in the treaty. Article 2 of the Treaty, as replaced by Article 1 of the 1998 Protocol, provides for the return of fugitives charged with or convicted of an "extraditable offense" as that term is defined under the Treaty. The documents submitted by Canada, and previously filed before this Court, establish that FROUDE has been convicted of multiple sexual offenses and charged with three counts of failing to comply with a LTSO, in violation of Section 753.3(1) of the Canadian Criminal Code. Therefore, FROUDE's extradition is sought both to serve the remainder of his Canadian sentence and to stand trial on three new charges arising out of his violation of the LTSO.

Article 2 of the Treaty defines offenses as extraditable if the criminal conduct is punished under the laws of both the United States and Canada by a deprivation of liberty for a maximum of at least one year or more or by a more severe penalty. Consequently, this Court should examine the description of the criminal conduct provided by Canada in support of its charges and decide whether that conduct would be criminal under United States law, if committed in this country. A requesting country is neither obliged to produce evidence addressing each element of a criminal offense, nor to establish that its crimes are identical to ours. Kelly v. Griffin, 241 U.S. 6, 15 (1916). Dual criminality is not a technical concept involving a comparison of elements of the two countries' offenses:

> The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions.

Collins v. Loisel, 259 U.S. 309, 312 (1922); Clarey v. Gregg, 138 F.3d 764, 765-66 (9th Cir. 1998) (Although simple homicide in Mexico differs from felony murder in the United States, the category of conduct is similar and satisfies the dual criminality requirement); Oen Yin-Choy v. Robinson, 858 F.2d 1400, 1407 (9th Cir. 1988) (crimes not identical, but Hong Kong crimes of false accounting and publishing a false statement are substantially analogous to United States crime of making a false entry in a bank statement); Cucuzzella v. Keliikoa, 638 F.2d 105, 108 (9th Cir. 1981) (Canadian "breach of trust statute analogous to federal embezzlement statues" so dual criminality satisfied).

Dual criminality is established if the conduct involved in the foreign offense would be criminal under either United States federal law, the law of the state in which the hearing is held, or the law of a preponderance of the states. Cucuzzella, 638 F.2d at 107-108. The court should "approach challenges to extradition with a view toward finding the offense within the treaty," McElvy, 523 F. Supp. at 48, "because extradition treaties should be interpreted with a view to fulfil our just obligations to other powers." Grin, 187 U.S. at 184. Foreign governments should not be expected to be versed in our criminal laws and procedures. Id. at 184-185.

5. The Evidence Establishes Probable Cause to Believe that FROUDE has Failed to Serve the Entirety of His Sentence

The standard of proof to find the evidence "sufficient to sustain the charge . . ." pursuant to Section 3184 is the familiar domestic requirement of probable cause. The court must conclude there is probable cause to believe that the crime charged by Canada was committed and the person before the court committed it. Mirchandani v. United States, 836 F.2d 1123, 1226 (9th Cir. 1988) (probable case standard applicable in extradition proceeding is whether any evidence exists warranting a finding that there was a reasonable ground to believe the accused is guilty). The evidence is sufficient, and probable cause is established, if a person of ordinary prudence and caution can conscientiously entertain a reasonable belief in the probable guilt of the accused. Gerstein v. Pugh, 420 U.S. 103, 111 (1975). As the Supreme Court explained long ago:

> [T]he proceeding before the commissioner is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him.

Benson v. McMahon, 127 U.S. 457, 463 (1888); See also Collins, 259 U.S. at 316 ("The function of the committing magistrate is to determine whether there is competent evidence to justify holding the accused to await trial, and not to determine whether the evidence is sufficient to justify a conviction."); Fernandez v. Phillips, 268 U.S. 311, 312 (1925); accord Barapind v. Enomoto, 400 F.3d 744, 752 (9th Cir. 2005).

In the case of a conviction, this Court's determination that there is probable cause may be based solely upon the existence of a judgment of conviction in the requesting country. See Spatola v. United States, 925 F.2d 615, 618 (2d Cir. 1991) (where "there has been a judgment of conviction [entered by a foreign court], there is no need for an 'independent' determination of probable cause: the relator's guilt is an adjudicated fact which a fortiori establishes probable cause"); Sidali v. I.N.S., 107 F.3d 191, 196 (3d Cir. 1997) (a foreign conviction obtained after a trial at which the accused is present is sufficient to support a finding of probable cause for the purposes of extradition).

Here, the certified Canadian conviction records and other documentary evidence submitted conclusively establish that FROUDE was convicted of one count of breaking and entering with the intent to commit a sexual assault (in violation of Section 341(b) of the

Canadian Criminal Code), one count of sexual assault with a weapon (in violation of Section 272(2) of the Canadian Criminal Code), and one count of uttering threats to cause bodily harm (in violation of Section 264.1(2) of the Canadian Criminal Code). Similarly, the certified Court records plainly show that, on May 16, 2008, Justice Rady sentenced FROUDE to ten years imprisonment and ten years of supervision pursuant to an LTSO. FROUDE's LTSO does not expire until September 22, 2022. FROUDE has 3,409 days remaining to serve on his LTSO. Accordingly, this Court should certify to the Secretary of State that FROUDE may be extradited to serve the remainder of his sentence. See In re Extradition of Robertson, 2012 WL 5199152, *11 (E.D. Cal. Oct. 19, 2012) (ordering extradition of fugitive to serve remainder of long term supervision imposed under Canadian law).

6. The Evidence Establishes Probable Cause to Believe that FROUDE Has Violated the Terms of His LTSO

Similarly, the documentary information that Canadian authorities have submitted conclusively establishes both that FROUDE is subject to an LTSO, and that the LTSO to which FROUDE was subject required him to: 1) reside at a community correctional center or other facility approved by the CSC; 2) remain in Canada; and 3) "obey the law and keep the peace." The Canadian government has submitted the regulations setting forth the requirements of the LTSO generally, and has also shown that the conditions FROUDE is alleged to have violated were incorporated into the LTSO itself. Further, the affidavits detailing FROUDE's alleged escape from the community correctional center in which he had been ordered to live, and that FROUDE was arrested here in the Central District of California, are sufficient to establish probable cause to believe that FROUDE has failed to

abide by the conditions of the LTSO. Accordingly, this Court should certify FROUDE's extradition to the Secretary of State.

C. Dual Criminality is Satisfied With Respect to Both Grounds Upon Which Extradition is Sought

First, there is no reasonable argument that failure to serve a judicially-pronounced sentence, without leave of court, is a crime in the United States. There is also no viable argument that the LTSO is not a part of FROUDE's sentence. Section 753.1 of the Canadian Criminal Code provides that upon finding an offender to be a long term offender, the Court shall "impose a sentence for the offense for which the offender has been convicted" and "order the offender to be supervised in the community of a period not exceeding ten years." Section 753.1, on its face, provides that a sentence for a long term offender includes both a term of imprisonment and a term of supervision. Furthermore, this Court should not become mired in the technicalities of the Canadian criminal process, because to do so would offend the principles of international comity and judicial modesty mandating the narrow scope of review in extradition proceedings. See, e.g., In re Extradition of Robertson, 2012 WL 5199152, at *10-11 (quoting Skaftouros v. United States, 667 F.3d 144, 156 (2d Cir. 2011)). It is the province of Canadian courts to determine whether an LTSO forms a part of an offender's sentence under Canadian law. This Court, therefore, should find that probable cause exists to believe FROUDE has failed to serve his entire sentence under the LTSO.

Next, dual criminality is satisfied regarding the fact that FROUDE escaped from a community correctional facility because, in the United States, an escape from an institution or facility in which a

person is confined by direction of the Attorney General is a felony punishable by up to five years' imprisonment. See 18 U.S.C. §§ 751(a), 4082(d). The Ninth Circuit has held that federal prisoners participating in halfway house programs by designation of the Attorney General commit the offense of escape when they willfully violate terms of their extended confinement. See, e.g., United States v. Keller, 912 F.2d 1058, 1060-61 (9th Cir. 1990) (failure to report to a community residential center constitutes an escape); United States v. Jones, 569 F.2d 499, 500 (9th Cir. 1978) (same); United States v. Winn, 57 F.3d 1078, 1078-79 (9th Cir. 1995). Other circuits hold the same view. See, e.g., United States v. Foster, 754 F.3d 1186, 1191 (10th Cir. 2014) (failure to return to a residential re-entry house violated § 751(a)).

In this regard, the Ninth Circuit's decision in United States v. Burke, 694 F.3d 1062 (9th Cir. 2012), is inapposite because supervised release in the United States is not analogous to a Canadian LTSO. In Burke, the Ninth Circuit held that a defendant who violated the terms of his court-ordered supervised release was not "in custody" under § 751(a) because he had already completed his prison term and was no longer in the custody of the Bureau of Prisons at the time of the violation. Id. at 1064. However, as discussed in the documents submitted by Canada, the CSC is the agency charged with both administering prison terms of two years or more, and overseeing the supervision of offenders subject to an LTSO. Further, it is the CSC that now seeks to enforce the remainder of FROUDE's LTSO, and accuses FROUDE of failing to comply with the terms of the LTSO. FROUDE's escape from the community correctional center in Portsmouth was, therefore, an escape from the CSC's custody, and is the legal

equivalent of an escape from the custody of the Attorney General under 18 U.S.C. § 751. Accordingly, there is dual criminality for each ground upon which Canada requests FROUDE's extradition.

V. CONCLUSION

For the foregoing reasons, the United States respectfully requests, on behalf of the government of Canada, that this Court certify the extradition of the fugitive to the Secretary of State for surrender to the Canadian government.